

BEFORE THE
Communications Commission
WASHINGTON, D.C. 20554

Defendant

¹ Section 76.1301(c) of the Commission's Rules, 47 C.F.R. § 76.1301(c).

(“HDO”);² to confirm that the hearing’s determination of all of those issues would be *de novo*, based solely on the evidence admitted at the hearing; and to correct the impossibly hasty 60-day timetable for decision provided for by the HDO. In the interest of avoiding repetitive sets of papers, Bright House adopts the position and arguments of Time Warner Cable in its “Reply” filed on this date and does not re-state them here.³

In addition to the arguments advanced by Time Warner Cable, however, Bright House wants to alert the Administrative Law Judge (“ALJ”) to a special concern that Bright House has about being included in this case: that, thus far, Bright House appears to have been pulled along in the slipstream of the other defendants in the WealthTV cases, rather than had its particular facts and situation subjected to the detailed scrutiny that the law and principles of due process require.

Among other things, the statute and the Commission’s regulation require that WealthTV show impairment, i.e., that the “effect of [the alleged refusal to carry] is to unreasonably restrain the ability of [WealthTV] to compete fairly.”⁴ Bright House serves approximately two percent of the multichannel television households in the United States, and neither of the media markets in which Bright House has most of its cable systems are in the Top Ten.⁵ So, unless the statute and regulation are interpreted to mean that every partially vertically-integrated multichannel video programming distributor, no matter how small on a national scale, is required to carry a

² *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, Hearing Designation Order*, DA 08-2269, released October 10, 2008, as modified by *Erratum* released October 15, 2008.

³ See Time Warner Cable Inc., “Reply to Opposition to Motion for Modification and Clarification or, in the Alternative, for Certification of Questions,” MB Docket No. 08-214, filed November 3, 2008, included herewith as Attachment 1.

⁴ Section 616(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 536(a)(3) (the “Act”), and Section 76.1301(c) of the Commission’s Rules, 47 C.F.R. § 76.1301(c).

⁵ Multichannel households are those households that subscribe either to cable television or to one of the Direct Broadcast Satellite services, DirecTV or Dish Network.

program service by a non-related entity that is substantially similar to a program service that it carries from a related entity,⁶ it would seem very unlikely that WealthTV could carry its burden on the impairment part of the case with respect to Bright House.

Despite this, the HDO is completely bereft of evidence to support this element of the case with respect to Bright House. Indeed, in support of the conclusion of impairment, the HDO (at note 118) cites an affidavit from WealthTV's expert that never once even mentions Bright House; and it cites some conclusory allegations and statements from Bright House's principals and its lawyers in their papers, neither of which alleges facts that show – or are claimed to show – that the non-carriage of WealthTV on Bright House's cable systems impairs WealthTV's ability to compete.⁷ In short, starting with WealthTV's Complaint and continuing with the HDO, Bright House's accusers seem largely to have assumed – rather than alleged, much less proved – the existence of facts that satisfy the essential statutory requirement to show “unreasonable restraint” with respect to Bright House in order to find liability against it.

It is for that reason that Bright House views it to be imperative that no material issue – as defined by the statute and the Commission's regulations⁸ – be overlooked in this hearing, that no conclusion asserted in the HDO be accepted *a priori* in this hearing and that the smashing together of three distinct cases, with a total of seven parties, into one breakneck-paced hearing – as suggested by the HDO – be avoided at all costs. Other than “because the HDO says so,” WealthTV has advanced no argument that would justify such a hasty and ill-considered action on the part of the ALJ. The alternative to such an injustice is not to keep WealthTV's status

⁶ For purposes of argument in this paper only, Bright House assumes the substantial similarity of the WealthTV program service to the “MOJO” program service. In reality, there is a substantial distinction between the two, and the fact that Bright House does not carry the WealthTV service is unrelated to any aspect of the MOJO service.

⁷ See HDO at ¶ 53, n.222.

⁸ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

indeterminate by dragging this case on for years, but simply to set aside a reasonable amount of time – a matter of months –so that these cases will be tried with a due regard for the procedural rights of all of the parties.

For these reasons, and for all the reasons stated in the “Reply” of Time Warner Cable, Bright House Networks urges the ALJ to grant its “Clarification Request.”

Respectfully submitted,

BRIGHT HOUSE NETWORKS, LLC

A handwritten signature in black ink, appearing to read 'R. Bruce Beckner', is written over a horizontal line.

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Dated: November 3, 2008

CERTIFICATE OF SERVICE

I, Glenda V. Thompson, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Reply to Opposition to Request for Modification and Clarification of HDO or, in the Alternative, for Certification of Application for Review" were served this 3rd day of November, 2008, via email, upon the following:

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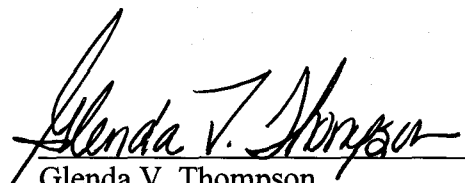
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